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Bruce Rauner, Governor
Department of Human Rights
Department of Human Services

ICED NEWS

State Interagency Committee on Employees with Disabilities

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Special Edition on Reasonable Accommodation

Presentation to ICED by Sharon Rennert, EEOC

On January 13, 2016, ICED held a special meeting with a presentation by Ms. Sharon Rennert, of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Rennert wrote the Americans with Disabilities Act (ADA) guidance on reasonable accommodation and is a national expert on employment-related disability issues. This special issue of the newsletter concerns her presentation, discusses state procedures, and provides reasonable accommodation resources.

Variety of Accommodations are Covered by the Law

The accommodation provision of the law is drafted broadly and must be tailored by the agency to individual situations. Applicants and employees, part-time, temporary/probationary, and full-time, are all entitled to accommodation. Types of accommodation include, but are not limited to:

Making existing facilities accessible;

Job restructuring;

Part-time or modified work schedules;

Acquiring or modifying equipment;

Changing tests, training materials, or policies;

Providing qualified readers or interpreters; and

Reassignment to a vacant position.

Both the Illinois Human Rights Act and the Americans with Disabilities Act require employers to provide reasonable accommodation, however, state law does not require agencies to reassign employees to a vacant position. Because federal law supersedes

state law, agencies are required to consider reassignment as an accommodation, when an employee, due to a disability, can no longer perform one or more essential job duties, even with a reasonable accommodation.

Accommodation Requirement Involves Decision-Making Process

Ms. Rennert began her presentation with the recommendation that the accommodation process be viewed as a decision-making process. The first step in this process is for an agency to determine whether the applicant or employee has a disability covered by the ADA. Since the ADA Amendments Act of 2008 became law, agencies don't have to spend as much time on this step. It should now be fairly easy to decide whether the condition in question is an ADA-disability. A medical condition does not have to be permanent or long-term but it does have to last several months. A medical condition may also be a disability even if the symptoms come and go – for example, certain mental illnesses or multiple sclerosis. If the employee has something of short duration, such as a cold or flu, where full recovery is expected, the agency does not have to provide accommodation. In determining whether an impairment is a disability employers should ignore the positive effects of any "mitigating measures"—for example, medications, medical devices, and behavioral adaptations—that lessen or eliminate symptoms of the condition. Because so many conditions now will meet the expanded definition of disability, if agencies believe something is not covered, it is a good idea to check that out with an expert. If the condition would be presumably covered, the interactive process should begin.

Accommodation Process Begins with Individual

The applicant or employee must request accommodation for the process to begin. Agencies should view as an accommodation request anytime an employee (or applicant) says two things: he/she has some kind of medical condition (or obvious disability) and because of the medical condition/obvious disability, he/she needs something special from the employer. It doesn't have to be the employee himself/herself requesting the accommodation; it could be a spouse, doctor, or rehabilitation counselor. Agencies should ensure/train staff (supervisors/managers, human resources, etc.) to recognize a request. The request doesn't have to be in writing, use the term "disability," mention reasonable accommodation or the ADA.

Medical Documentation Can be Requested Sometimes

When it isn't clear that an employee has a disability, an agency can request medical documentation to support its existence. This information can be used by the agency to determine whether an ADA disability is present. Remember that requests for medical information should be in "plain English" and not legalese. For example, if you are unclear what "major life activity" or "major bodily function" is affected by the condition, then don't use legal terms but translate it into something the medical practitioner will understand. In this example you might ask the practitioner what activity or type of

activity is impacted, or what part of the body or internal system is affected by the condition. If you are uncertain what appropriate questions are, please contact one of the experts listed in this article. The more precise the question, the more likelihood you will receive helpful information.

In many cases there will be no need for medical documentation about whether the medical condition is a disability. More common may be a need to request medical information on why an accommodation is needed, how one or more specific accommodations might meet that need, and any pros and cons about choosing one accommodation over another. Individuals should not be asked to provide the agency with complete access to their medical files. Agencies cannot initiate discussion with an individual's medical provider without a release of medical information provided by the applicant/employee. Any medical information provided is confidential and should be treated as such. Only staff with a need to know should be given access to an individual's medical documentation.

Essential Functions May Be Important to Identify

Reasonable accommodation may be required to permit an applicant with a disability an equal opportunity to apply and compete for a job, or to permit an employee equal access to the benefits and privileges provided to other employees (for example, building cafeterias, parking, bathrooms, special programs, and social activities). If an employee needs a reasonable accommodation to perform the job, then Ms. Rennert reminds employers that the measure of whether an accommodation is successful is if it permits and employee to perform essential functions of the specific job he or she is applying for or currently holds.

Agencies do not have to reassign essential functions as an accommodation. Essential functions are those that are integral to the job. Marginal functions, things that are incidental, may have to be given to another employee to perform, or swapped for a different marginal job duty, to accommodate an employee with a disability. In determining whether functions are essential or marginal, the job description can be helpful, as can incumbents' testimony. Agencies with questions as to which duties in a given job description are essential should contact an expert in the field.

Accommodation Experts Can Help

Ms. Rennert recommends that agencies consult accommodation experts when needed. Employees with disabilities may know what is needed in accommodation, but if the disability is new or the applicant doesn't know how the job is performed, an outside expert may help. The Job Accommodation Network, at **(800)526-7234** (Voice) (**877)781-9403** (TTY), or http://askjan.org/, is a free resource for any accommodation questions from individuals or agencies. The Illinois Assistive Technology Program (IATP), at Technology Program Website, or (217) 522-7985 voice

(217) 522-9966, TTY, (217) 522-8067, fax, (800) 852-5110, v/tty, email: iatp@iltech.org, is a good source of information about technology and equipment that can be used in accommodation. IATP has a loan program for equipment that could be used by people with disabilities in accommodation.

State Agencies have Accommodation Experts

Each agency has an Equal Employment Opportunity/Affirmative Action (EEO/AA) Officer and an Americans with Disabilities Act (ADA) Coordinator. Lists of agency EEO/AA Officers and ADA Coordinators appear on the ICED website, at ICED website. An employee can begin the accommodation process by talking to his/her supervisor, the EEO/AA Officer, or ADA Coordinator (procedures may differ by agency, but one of these individuals should be able to start the process). The agency contact should be able to advise an employee with a disability about the process.

Agencies Can Deny Accommodations

Ms. Rennert explained that employers can deny an accommodation when it would require the removal of an essential job duty, or when the requested accommodation is personal in nature, i.e., a wheelchair or hearing aids. Ms. Rennert also said an agency does not have to delay discipline that would otherwise be imposed. Finally, employers are not required to provide accommodations when they would impose "undue hardship" on the operation of their businesses. Ms. Rennert said the undue hardship standard is not easy to meet, particularly for state agencies, where the state as a whole has a large budget and most accommodations are relatively inexpensive.

Undue hardship means significant expense or disruption. A significant disruption might interfere with co-workers' ability to perform their jobs or the agency's ability to meet its mission. The fact that an accommodation causes some more work would not allow an employer to argue that the accommodation was disruptive. Ms. Rennert had a couple of suggestions for state agencies in regards to accommodations and undue hardship. The first would be to provide the accommodation on a trial basis to determine whether it worked or was significantly disruptive. The second suggestion was to contact state experts at the Department of Human Rights or ICED to discuss the matter. Contact information appears on the last page of the newsletter for this assistance. If agency personnel routinely find requests for reasonable accommodation to be an undue hardship then it is likely that staff do not understand what is required to meet this high standard, and therefore, should seek assistance from an accommodation expert.

Ms. Rennert Responded to Questions

The first question concerned telework, and Ms. Rennert said each agency must consider this type of accommodation, if it is needed. As with any other accommodation request, the agency should look at a request for telework individually based on the employee's needs and the agency's ability to meet the needs. Some other type of

accommodation may work, and if so, the agency is free to implement it. Ms. Rennert suggested a trial period of telework to determine its feasibility.

The second question concerned accessibility into a building, as to whether automatic doors are required and the positioning of keypads would have to be changed to accommodate an employee. If the building is owned by the state, there is somewhat more flexibility in making a modification to the building. Installation of an automatic door and moving an existing security keypad may be reasonable accommodations.

A couple of questions addressed the accommodation process. One was whether an agency can deny an accommodation when the employee in question refuses to engage in the interactive process. The answer is 'yes,' however, once the employee starts to engage in the process again, the accommodation request should be re-considered. Along these lines, Ms. Rennert reminded agencies that they cannot force an accommodation on an employee. If he/she refuses the accommodation, the employee has to meet all production and behavioral standards without the accommodation and can be disciplined on those grounds if such standards are not met.

The second accommodation process question was whether an agency could conduct an annual review of accommodations provided over the period. Ms. Rennert said it is always wise to follow-up with an employee to determine whether the accommodation is working, sometimes within a couple of days of providing an accommodation and sometimes within a few weeks. If there is a question whether an accommodation is still needed, an agency might want to follow-up with an employee sooner than one year after the original accommodation. The length of time should be determined based on what is known about the disability and the need for the accommodation. For example, if the disability was expected to last only six months, and the period has ended, then the agency should check back with the employee whether the accommodation is still needed.

If the employee or medical documentation indicated that it was unclear how long accommodation would be needed, it might be appropriate to check back after one year. If it was initially clear that the accommodation would be needed permanently (for example, a sign language interpreter for staff meetings) then the agency should not inquire whether the accommodation is still needed. Given the variables involved in every request for accommodation, it is almost impossible to develop a "one size fits all" approach to handling and reviewing these requests.

The last question concerned an employer's obligation to accommodate an employee with fragrance sensitivity. First, Ms. Rennert said it's important to determine whether the employee has a medical condition, not just sensitivity to a fragrance or product. The next step is to determine what products in the workplace are affecting the employee,

cleaning products, carpet, or specific beauty and personal hygiene products, including perfumes and colognes and other scented things like deodorant, shampoo, hand lotion, etc. It's easier to accommodate a situation involving a cleaning product, particularly if the employer has authority over cleaning the facility in question. Even if it does not have direct authority the agency should contact whoever does have that authority to ask about possible changes in cleaning products. The agency should ask the employee which cleaning products cause a problem for him or her and then determine if there are alternative products that would work for the employee. **It is not practical to prohibit employees as a whole from using personal products that contain fragrances**. Other accommodations may include offering telework to the employee with a medical condition made worse through exposure to certain chemicals or fragrances. Another accommodation could be provision of a private office to the employee in question.

ICED/DHR Can Help

No one program can answer all questions in this complex area of the law. Questions regarding reasonable accommodation can be sent to Susan Allen, of the Department of Human Rights and ICED, at Susan.Allen@Illinois.gov. Ms. Allen can be reached at (217) 785-5119 (Voice) and 866-740-3953 (TTY).

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Serving State Employees with Disabilities

222 S. College, Room 101, Springfield, IL 62704

(217) 785-5119 (Voice); (866) 740-3953 (TTY); (217) 785-5106 (Fax)

www.state.il.us/iced

Susan.Allen@Illinois.gov

Note: For alternative formats, contact Susan.Allen@Illinois.gov